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No. 95-1376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHARLES T. ROBINSON, SR.,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS AMICUS CURIAE SUPPORTING RESPONDENT

ROBERT E. WILLIAMS *
ANN ELIZABETH REESMAN
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS AMICUS CURIAE SUPPORTING RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief urges the Court to affirm the decision of the court of appeals and, thus, supports the position of the respondent, Shell Oil Company, before this Court.

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[1] Letters of consent from both parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is an association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include approximately 300 of the nation's largest corporations, as well as several industry associations that, in turn, have hundreds of corporate members. EEAC's directors and officers include many of industry's foremost experts in the field of equal employment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies.

EEAC's members, and the constituents of its association members, are all employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as well as other federal, state and local laws governing employment. As such, they stand to be affected by the Court's interpretation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), in this case. The court below held that Section 704 (a)—which makes it unlawful for an employer to retaliate against "his employees or applicants for employment" for engaging in certain activities protected by Title VII—does not apply to actions taken against persons who have ceased to be employees of, and are not seeking employment with, the employer in question. A contrary reading of the statute would increase the exposure of employers, including EEAC's members, to charges and lawsuits under Title VII.

On a more general level, EEAC's members also have an ongoing interest in the care and precision with which legislators draft, and courts interpret, statutes

that regulate employment. Over the two decades of existence, EEAC has seen at close hand numerous instances in which imprecise drafting and overly expansive interpretation of statutory language have led to costly litigation that could have been avoided or curtailed, had legislators been more careful in their use of words or courts more faithful to their meaning. In this case, the petitioner urges the Court to hold that when Congress used the word "employees" in Section 704(a), it meant to include persons who have *ceased to be* employees, and that when Congress defined the term "employee" in Section 701(f) of Title VII, 42 U.S.C. § 2000e(f), as "an individual employed by an employer," it meant to include individuals who *no longer* are employed by an employer. Supreme Court approval of such contorted statutory interpretations would violate well-established canons of legislative interpretation. It also would abet the tendency of some lower courts, and many litigants, to treat statutory language as a ductile substance that, with ingenuity and determination, can be stretched and twisted to mean almost anything—including, in some instances, even the exact opposite of what it actually says. In EEAC's experience, that approach only leads to more litigation and greater uncertainty about the laws, including the employment laws that are of direct interest to EEAC's members.

Because of its interest in the application of the nation's fair employment laws, EEAC has, since its founding in 1976, filed more than 390 briefs as *amicus curiae* in cases before this Court, the United States Courts of Appeals, and various state supreme courts.[2] Thus, EEAC has an interest in, and a famil-

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[2] *E.g., West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83 (1991); *Boureslan v. ARAMCO,* 499 U.S. 244 (1991);

iarity with, the issues and policy concerns presented in this case. Because of its significant experience in such matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

Respondent Shell Oil Company terminated Petitioner Charles Robinson's employment in 1991. Robinson later filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Shell had discriminated against him on the basis of race. Several months after the termination of his employment with Shell, Robinson applied for a job with another company. When the prospective employer contacted Shell, Shell gave him a negative reference, which Robinson attributes to his having an EEOC charge. Robinson then filed a second charge with EEOC, alleging that Shell had retaliated against him because of his filing of the first charge.

Robinson sued Shell under Section 704(a) of Title VII.[3] Shell moved to dismiss, arguing that, since Robinson was not employed by Shell at the time of the alleged retaliation, his claim was not covered by Section 704(a). The district court agreed, granted Shell's motion, and entered an order dismissing the case. Robinson then appealed to the Fourth Circuit.

Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989).

[3] Robinson also filed a separate lawsuit concerning the termination of his employment with Shell. After trial in that case, the judge entered judgment in Shell's favor, finding that there was no evidence of race discrimination. Robinson did not appeal that judgment.

A panel of the court of appeals reversed, but on rehearing en banc, the Fourth Circuit affirmed the district court's holding that Section 704(a) does not cover retaliation against former employees.

SUMMARY OF ARGUMENT

The court of appeals correctly recognized that Section 704(a) of Title VII does not cover retaliation against a person who is neither an employee of, nor an applicant for employment with, the employer in question at the time the retaliation is alleged to have occurred. By its express terms, that section applies only to retaliation that is directed by an employer "against any of his employees or applicants for employment." 42 U.S.C. § 2000e-3(a). The plain meaning of the words "his employees" cannot be stretched to cover persons who no longer are employed by the employer in question. This conclusion is reinforced by the definitional section of Title VII, 42 U.S.C. § 2000e(f), which defines the term "employee" as "an individual employed by an employer," for it requires more than mere stretching to make that definition fit individuals who are *not* employed by an employer.

The wording of Section 704(a) differs significantly from that of Section 703(a), which sets forth Title VII's general ban on employment discrimination based on race, color, religion, sex or national origin. Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to [employment]" on the basis of any of those protected characteristics. 42 U.S.C. § 2000e-2(a) (emphasis added). Congress could have written Section 704(a) similarly broadly, to bar employers

from retaliating against any individual for filing a charge with the EEOC. But Congress chose instead to extend the protection of the anti-retaliation section only to "employees [and] applicants for employment." Congress having thus expressed its will in plain language, it is beyond the proper role of the federal courts to impose a broader ban against retaliation.

The Fourth Circuit's reading of Section 704(a) is fully in keeping with Title VII's purpose and remedial scheme. It affords persons currently employed protection against retaliation by their employers, and persons seeking employment protection against retaliation by *prospective* employers. It is not necessary that Title VII also afford persons who are not employed a remedy against possible retaliation by their *former* employers. Common law provides ample remedies against most forms of retaliation by former employers. For example, a company that provides false information in response to a reference check, or otherwise wrongfully interferes with a former employee's efforts to secure new employment, invites a civil suit for defamation, torious interference with contractual relations, and other possible claims. There is no need to stretch Title VII beyond the reach of its language to duplicate these civil remedies.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 704(a) OF TITLE VII DOES NOT GIVE A FORMER EMPLOYEE A CAUSE OF ACTION FOR RETALIATION ALLEGED TO HAVE OCCURRED AFTER THE EMPLOYMENT RELATIONSHIP ENDED.

A. Introduction.

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."

Lewis Carroll, *Through the Looking-Glass*, 94 (1946).

Courts are not free to give words any meaning they choose to give them. Rather, as this Court has said "time and again," when it comes to construing statutory language, the "cardinal canon" is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252 (1992), citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242 (1989), and *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897).

Section 704(a) of Title VII says, in plain language, that it is unlawful for an employer to retaliate against "his employees and applicants for employment." As the court of appeals correctly recognized, since these words are unambiguous, that ends the matter. For, in this situation, the "first canon is also

the last: 'judicial inquiry is complete.'" *Id.*, citing *Rubin v. United States*, 449 U.S. 424, 430 (1981), and *Ron Pair Enters., supra*, 489 U.S. at 241.

B. The Court of Appeals Correctly Recognized that the Phrase "His Employees" in Section 704(a) Unambiguously Denotes Individuals Who Are Employed by the Employer in Question, Not Those Who Are Not Employed.

Commonly known as Title VII's anti-retaliation provision, Section 704(a) says:

> It shall be an unlawful employment practice for an employer to discriminate against any of *his employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a) (emphasis added). As the court of appeals correctly recognized, the words "his employees" in this provision unambiguously denote persons who currently are employed, not persons who once were employed but currently are not.

As the court of appeals observed, "[i]n examining statutory language, generally, words are given their common usage." (Pet. App. A-6, quoting from *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 954 (1995) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The Fourth Circuit properly followed that maxim by giving the words "his employees" in Section 704(a) their ordinary meaning.

The Seventh Circuit recently observed in *Veprinsky v. Fluor Daniel, Inc.*, No. 95-2197, 1996, U.S. App.

LEXIS 15323 (7th Cir. June 26, 1996), that a literal reading of the term "his employees" as used in Section 704(a) does not include former employees.[4] As the Seventh Circuit declared in its opinion in that case:

> Because neither Section 704(a) nor the definition of "employee" [in 42 U.S.C. § 2000e(f)] expressly includes former employees, a literal reading of the statute would exclude them from coverage.

Id. at *8. One of the *amici* supporting the petitioner's cause similarly concedes that a "literal interpretation" or the word "employee" would exclude former employees. *Brief for National Employment Lawyers Ass'n as Amicus Curiae In Support of Petitioner* in *Robinson* at 5. The petitioner's own brief states more guardedly that the use of the term "employee" to refer to a former employee "might be characterized as 'colloquial.'" *Brief for Petitioner* at 13.

The petitioner and his *amici* refer to "literal interpretation" almost pejoratively. They portray their "colloquial" use of the word "employees" as superior to a literal one, because, they say, their version comports with "common usage." But the common usage of a word cannot so readily be separated from its literal meaning. "Literal" simply means "following or representing the exact words of the original," or

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[4] The court in that case went on, however, to reject a literal reading of Section 704(a) in favor of a reading that extends its coverage to former employees who have complained about "post-termination acts of retaliation that have a nexus to employment." *Id.* at *23. For the reasons set forth herein, it is submitted that the court in that case was incorrect in its ultimate holding that Section 704(a) should not be read literally.

"based on the actual words in their *ordinary meaning*; [as opposed to] figurative or symbolical." *Webster's New World Dictionary* 825 (2d College Ed. 1980) (emphasis added).

In pressing their strained contention that in common usage, the word "employees" includes former employees, the petitioner and his *amici* erroneously equate common usage with casual and imprecise usage. For example, the United States and the Equal Employment Opportunity Commission assert in their brief as *amici curiae*, that "[o]ne might say . . . 'the fire at the plant was set by a disgruntled employee' when referring to an employee who had recently been fired." *Brief for United States and EEOC as Amici Curiae Supporting Petitioner* in *Robinson* at 12. Perhaps so, but without more, a careful listener most likely would assume that the speaker was referring to a current employee.

The common usage of a term is better determined by reference to how it is likely to be understood by a careful listener than by how it might be misused by a careless speaker. Thus, in ascertaining the common usage of a word or phrase, it may be helpful to consider how a jury would interpret it if it were used in testimony. To build on the example offered by the government *amici*, suppose that, after the fire at the plant, a trial were held and a witness testified that the fire was set by an employee of the company. Without other information, jurors almost certainly would assume that the witness was referring to a current employee. Indeed, if it were brought out later that the witness knew, but failed to say, that the person had been discharged before setting the fire, the jurors probably would consider the witness' testimony less than forthright.

In reading legislation, it must be assumed that the drafters were at least trying to be clear and precise in their use of words. Thus, the use of the word "employees" in a statute, without any modifying or qualifying language, must be understood to refer to persons who *are* employed—not persons who *were* employed but are not any more. For if the drafters had wished to refer to persons who no longer are employed, they easily could have achieved clarity of expression by adding the adjective "former." Since Section 704(a) uses "employees" without "former" or any other modifier, the court of appeals clearly was correct concluding that the Section unambiguously refers only to current employees.

Title VII's definitional section is similarly unambiguous in denoting persons currently, rather than formerly, occupying employment relationships. It states simply that "[t]he term 'employee' means an individual *employed* by an *employer* . . . ." 42 U.S.C. § 2000e(f) (emphasis added). As the court of appeals observed:

> The term "employed" as used in subsection 2000e(f) is commonly used to mean 'performing work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). Certainly the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship." Furthermore, "employer" as used in subsection 2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term "employer" is commonly used to mean "one who no longer employs the services of others."

Pet. App. at A-12.

It is quite true that subsection 2000e(f)'s definition of "employee" suffers from a circularity that renders it unhelpful in distinguishing employment relationships from other business arrangements, such as independent contractor relationships. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). But the circularity does not affect the definition's temporal frame of reference. The definition simply refers to persons "employed," not to persons "once employed," "formerly employed," or "ever employed."

Again, the petitioner and his *amici* are forced to resort to strained and unpersuasive arguments in contending that "employed" in this context refers to past, as well as present employment. To be sure, "employed" can be used in past constructions, as when it is coupled with a past tense verb (*e.g.*, "he *was* employed"). But when unaccompanied by any verb or modified with a temporal connotation, the term is commonly understood to refer to a present condition. For example, a questionnaire asking an employer to state the "number of persons employed" at its headquarters facility would commonly be understood to call for the number *presently* employed there, not the total number of persons *ever* employed at the facility.

Equally unpersuasive are the arguments of the petitioner and his *amici* that court opinions, other provisions of Title VII, and provisions of certain other statutes illustrate that the word "employees" is commonly used to encompass former, as well as current employees. Those arguments largely beg the question that is before the Court in this case. For the most part, too, they refer to statutory provisions that are significantly different from Section 704(a). For example, the government *amici* argue that former employees are encompassed in the term "employees" as used in Section 706(g)(1) of Title VII, 42 U.S.C. § 2000e-5(g)(1), which provides that a court may order "reinstatement or hiring of employees." *Brief* at 10. But that remedial provision contemplates situations in which a court has found that the individuals in question are legally entitled to current employment. In those circumstances, it is entirely logical to refer them as "employees." In the present case, in contrast, the petitioner seeks to expand the meaning of "employees" to include persons who, at the time of the alleged unlawful conduct, neither held current employment nor had any legal entitlement to current employment with the employer in question.[6]

Similarly misplaced is the reliance of the petitioners and their *amici* on dicta in this Court's opinion in *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The basic holding of that case is that the term "employee" in the National Labor Relations Act (NLRA) does not encompass retirees, because retirees have ceased to work for another for hire. *Id.* at 168. In dicta, the Court opined that the term "employee" in the NLRA could include "persons who have quit or whose employers have gone out of business," because such persons are still "members of the active work force available for hire and at least in that sense could be

[6] Similarly misplaced is the government *amici's* reliance (*Brief* at 12-13) on decisions in which this Court has referred to individuals no longer able to work as "disabled employees." *E.g., Richardson v. Belcher*, 404 U.S. 78, 81 (1971). That phraseology is merely a convenient way of differentiating persons disabled by, or as a result of, employment from those disabled in other respects.

identified as 'employees.'" *Id.* But in offering these views, the Court was interpreting the NLRA's definitions of "employee," which differs materially from Title VII's definition. The NLRA's definition states:

> The term "employee" shall include any employee, and *shall not be limited to employees of a particular employer*, unless this subchapter explicitly states otherwise, *and shall include any individual whose work has ceased* as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained other regular and substantially equivalent employment. . . .

29 U.S.C. § 152(3) (emphasis added). In contrast, Title VII's definition of "employee" contains none of the expansive language of the NLRA definition italicized above.

Moreover, Section 704(a) of Title VII specifically applies only to actions of an employer directed against "*his* employees"—*i.e.*, employees of the particular employer alleged to have committed the acts of retaliation. Thus, the *Pittsburgh Plate Glass* Court's focus on whether the individuals in question are available for hire by *any* employer clearly relates an element of the NLRA definition of "employee" that has no counterpart in the Title VII definition. Reference to the NLRA definition of "employee" does, however, demonstrate that Congress knows how to write a definition that clearly includes persons other than current employees of a particular employer when it wishes to do so.

That Congress intended the word "employees" in Section 704(a) to refer only to present employees is further confirmed by the fact that Congress took

pains to use separate terminology to ban retaliation against "applicants for employment." As the court of appeals recognized, the addition of the phrase "applicants for employment" would not have been necessary if "employees" had no temporal element. Pet. App. at A-13.

C. Congress' Choice of the Phrase "His Employees and Applicants for Employment" in Section 704(a), In Contrast to Its Use of "Any Individual" in Section 703(a)(1), Further Indicates an Intent to Give the Anti-Retaliation Section Less Inclusive Coverage.

Significantly, while Congress directed Title VII's protection against retaliation in Section 704(a) solely to "employees and applicants for employment," it structured the statute's general ban on employment discrimination more broadly. Section 703(a) declares it an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify *his employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added).

Thus, Congress carefully distinguished in Section 703(a) between a broad range of discriminatory ac-

tions, described in subsection (1), which it made unlawful when directed by an employer against *any individual*, and certain specific activities described in subsection (2), which it made unlawful only when directed by an employer against *its own employees or applicants* for employment. The nature of the actions proscribed by subsection (2)—*i.e.*, limiting, segregating, and classifying—indicates that that section is addressed only to conduct directed at current employees or applicants, not former employees, because an employer ordinarily would be in no position to "limit, segregate, or classify" former employees or "otherwise adversely affect [their] status as employees." Indeed, we are aware of no case in which Section 703(a)(2) ever has been applied to *former* employees.

In describing the class of individuals protected against retaliation under Title VII, Congress could have patterned Section 704(a) after Section 703(a)(1), thus making it unlawful for an employer to retaliate against "any individual" for opposing conduct made unlawful under Title VII or for filing charges with the EEOC or otherwise participating in proceedings under Title VII. Significantly, however, Congress chose instead to pattern the description of the class protected against retaliation under Section 704(a) more narrowly, adopting the same phraseology as it used in Section 703(a)(2)—*i.e.*, "his employees or applicants for employment." The choice of this more limited language in both 703(a)(2) and 704(a) provides additional evidence that Congress intended the latter section to proscribe retaliation only when directed against a certain, limited class of individuals—*i.e.*, those currently holding or seeking employment with the employer in question.

II. THE COURT OF APPEALS' READING OF SECTION 704(a) IS FULLY CONSISTENT WITH TITLE VII'S PURPOSE AND REMEDIAL SCHEME.

This Court has held repeatedly that the literal terms of a statute may be overridden by courts only in "rare and exceptional circumstances" when a literal application would lead to "an absurdity . . . so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 59 (1930); and *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). Contrary to the arguments of the petitioner and his *amici*, the court of appeals' straightforward reading of Section 704(a) in this case does not lead to an absurd result or to one that is at odds with the purpose and remedial scheme of Title VII.

Instead, as read and applied by the court of appeals, Section 704(a) is fully consistent with Title VII's purpose and supportive of its remedial scheme. It affords individuals a remedy when they are retaliated against by their current employer for having filed a charge with the EEOC or engaged in other activity protected by Title VII. It also affords individuals a remedy when they are discriminated against by a prospective employer for having filed a charge or engaged in other activity protected under the statute. Thus, as read by the court below, Section 704(a) does nothing destructive of the ends Title VII was enacted to accomplish. Quite the contrary, it helps to ensure that those ends are not thwarted by retaliation by either current or prospective employers. That the section does not reach every other possible form of retaliation does not render it either absurd or contrary to the statutory purpose.

About the only way in which an employer can discriminate against a former employee (other than one

seeking re-employment) is by interfering with the person's ability to secure or retain employment with others. But employers today are well aware that the common law prohibits wrongful interference with individuals' efforts to secure employment and affords ample civil remedies to those subjected to such conduct. Fear of civil suits for defamation has caused many employers to adopt strict policies of not responding to reference checks on former employees, or of merely confirming dates of employment and positions held but not disclosing any information regarding the individual's job performance, conduct, or reason for termination of employment. Employers also are well aware that "blacklisting" of former employees or pressuring other employers not to hire them can lead to liability for civil conspiracy, tortious interference with contractual relations, and other violations of common law.

Accordingly, there is no danger that affirmance of the decision below will lead to widespread retaliation by employers against former employees, or leave them without protection if they oppose practices made unlawful by Title VII, file charges with the EEOC, or otherwise participate in proceedings under Title VII. Nor is there any need to duplicate the existing civil remedies already available to such individuals by extending the protection of Section 704(a) beyond persons who are "employees and applicants for employment" as those terms are commonly understood.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council urges that the decision of the court of appeals be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS *
ANN ELIZABETH REESMAN
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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